89-466

Supreme Court, U.S.
FILED
MAR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GABRIEL A. MAALOUF, in Pro Se,
Petitioner,
vs.
SAMIR KAZAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

GABRIEL A. MAALOUF, Pro Se
5300 S. Paradise Road, Suite A
Las Vegas, Nevada 89119
702/736-1786

QUESTIONS PRESENTED

1. Was the order of the Ninth Circuit Court issued on December 22. 1988 denying petitioners motion for rehearing proper.

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GABRIEL A. MAALOUF, in Pro Se,
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vs.

SAMIR KAZAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

GABRIEL A. MAALOUF, in Pro Se,
5300 S. Paradise Avenue, Suite A
Las Vegas, Nevada 89119
702/736-1786

PARTIES

GABRIEL A. MAALOUF, in Pro Se, Petitioner prays that a writ of certiorari issued to review the orders and judgments of the United States District Court and the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on the 22nd day of December, 1988 and attached hereto as pages 1 through 156 of Appendix A.

The parties are identified in the caption.

OPINION AND ORDER BELOW APPEALED FROM

The U.S. Court of Appeals for the Ninth Circuit issued its opinion in this matter, the order denying petitioners motion for rehearing to set aside a default judgment is attached in Appendix "A" hereto as pages 1 and 2.

JURISDICTION

The Order of the U.S. Court of Appeals for the Ninth Circuit, Appendix A hereto, pages 1 and 2, was entered on the 22nd day of December. 1988.

The jurisdiction of this Court is invoked pursuant to Article III, Section 3, of the Constitution of the United States; 28 U.S.C. Sections 1254 and 1651; And Supreme Court Rule 17 (1) (a) .

CONSTITUTION AND STATUTORY PROVISIONS

1.

Constitution

Article III, Section 3 - United States Constitution

2.

Statutory

Rule 11 - Federal Rules of Civil Procedure

Rule 38 - Federal Rules of Appellate Procedure

Supreme Court Rule 17 (1) (a)

28 U.S.C. §§ 1254, 1651

BACKGROUND FACTS

In the court's opinion of December 22, 1988, the court determined that Rule 55 did not apply to GABRIEL A. MAALOUF and BIG H CORPORATION because they had neither appeared in the action when the Default Judgment was requested nor demonstrated a purpose to defend the suit.

While apparently overlooked by counsel for the party, and not included in the Excerpt of the Record on Appeal, these Defendants GABRIEL A. MAALOUF and BIG H CORPORATION, did either appear or attempt to appear, in the lower Court proceedings in at least two (2) instances.

On February 21, 1984, Defendants G.A.M. ENTERPRISES, INC., GABRIEL A. MAALOUF and BIG H CORPORATION, appeared by way of a DEFENDANTS MOTION TO SRIKE and to be removed as party to action and MEMORANDUM OF POINTS AND AUTHORITIES and MOTION TO STAY ENTIRE PROCEEDINGS and MEMORANDUM OF POINTS AND AUTHORITIES in support thereof.

On April 9, 1984 the Court denied this Motion and Ordered the action to remain open and on the calendar of Judge Lydick.

On or about May 10, 1984 Gabriel A. Maalouf and Big H Corporation appeared before the Cort on a Motion to Dismiss pursuant to FRCP 41(b). Said motion was rejected by Judge Lydick as Petitioner was not represented by counsel. The Court so informed Petitioner that he could not represent a corporation in pro se.

Although the 41(b) Motion was signed, Gabriel A. Maalouf, president of G.A.M. Enterprises, Inc., in proper person, the Motion was never signed Gabriel A. Maalouf, president of Big H. Corporation. The Court erred in this assumption. G.A.M. Enterprises was currently in Chapter 11 proceedings since Mr. Kazan did not lift the automatic stay to file the law suit, G.A.M. Enterprises was not defaulted.

While Petitioner was seeking to obtain counsel for the above stated matter, the Court on or about June 1, 1984 entered an Order denying Petitioner's 41(b) Motion, stating that a corporation may not appear in an action or proceeding in proper person.

On June 25, 1984 Petitioners obtained counsel, Jeffrey N. Samuels, Esq., and the Motion to Dismiss pursuant to Rule 41(b) was refiled. Counsel understood that the first Motion to Dismiss had been denied on the above referenced ground. Thus on August 21, 1984 the Court entered an Order denying the 41(b) Motion filed by counsel Jeffrey N. Samuels.

On September 4, 1984, a default was filed by the Clerk of the Court. Subsequently, a default judgment was entered against Petitioner on October 24, 1984.

It is the December 22, 1988 Order that the instant Petitioners now pray for a Writ of Certiorari to issue from this Court counsidering.

LEGAL ARGUMENT

Traditionally the Federal court system has held that Rule 55 (b) (2) of the Federal Rules of Civil Procedure is to be upheld where the facts and circumstances so warrant. Pursuant to said rule petitioner in this instant matter would have been entitled to a three day notice of intent to default prior to any default having been entered.

CARGILL INC. v. COHEN, 115 F.R.D. 259 (M.D. Ga. 1987), recently the court held that notice of the application for default judgment was required since plaintiff concedely made an appearance by filing a complaint. Appearance required by the rule has been broadly defined and is not limited to a formal court appearance.

As discussed in the facts, your instant petitioner made an appearance by way of Defendant's Motion To Strike and Memorandum of Points and Authorities, along with other pleadings listed in the facts.

A defendant need not respond directly to a pleading or complaint in order for his conduct to constitute an appearance. An appearance may arise by implication from defendant's seeking, taking or agreeing to some step or proceeding in the course beneficial to himself or detrimental to himself. See 6 C.J.S., Appearances section 12 p. 17. For further support and discussion see HELEASCO SEVENTEEN, INC. v. DRAKE 102 F.R.D. 909 (U.S. District D. Delaware, 1984), whereby the court held a defendant can respond to a complaint indirectly and constitute an appearance. Informal contacts between parties may constitute an appearance. The contacts must "indicate the defaulting party intends to defend the suit," citing HELEASCO, SUPRA.

Where such facts and circumstances are prevalent, the default judgment must be set aside as the petitioner is entitled to the three day notice pursuant to Rule 55 (b) (2).

Defendants made an "appearance" and were entitled to three days prior notice of plaintiff's application for a default; judgment when defendants' attorney initiated telephone conversations with plaintiff's attorney and defendants attorney conveyed to plaintiff's attorney the problems defendants were having due to complexity of case. HELEASCO, SUPRA.

Further discussion of notice and appearance is found in H.F. LIVERMORE CORPORATION v. AKTIENGESELISCHAFT GEBRUDER LOEPFE 432 f. 2d 689 (U.S. Ct. of Appeal, Dist. of Columbia Circuit, 1970), whereby the court held that a defendant "appeared" in an action and was entitled to notice of application for default judgment, where there were exchanges between the parties in an effort to see if dispute could be adjusted by agreement. Appellant made its purpose to defend the suit quite plain to the Appellee. The court concluded the District Court erred in refusing to set aside the default judgment at p. 692.

It is respectfully submitted by the Petitioner that if the Court based on these facts, reasons and prior documents determines that GABRIEL A. MAALOUF, and BIG H CORPORATION, did in fact appear in the action and demonstrate an intent to defend, they would have been entitled to the Three Day notice.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully submit to the Court that appearance were made, and they were entitled to a Three Day Notice of Intent to Default.

Dated this 16th day of AUGUST, 1989.

Respectfully submitted,

Gabriel A. Maalouf

GABRIEL A. MAALOUF, in Pro Se
5300 S. Paradise Avenue, Suite A
Las Vegas, Nevada 89119

CERTIFICATION OF SERVICE

I hereby certify that I am over 21 years of age, a citizen of the United States, and not a party to nor interested in this action.

I further certify that I placed a true copy of the foregoing Petition for Writ of Certiorari, in the U.S. Mail, postage fully prepaid and thereto affixed and addressed as follows:

Gloria M. Sanchez
Law Offices of Dorame & Sanchez
404 West Fourth Street
Suite B
Santa Ana, CA 92701

Attorney for Respondents

Dated this 17 day of August, 1989.

Anne Thornton

Anne Thornton

APPENDIX "A"

1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	)	
	)	
SAMIR KAZAN,	)	
Plaintiff-Appellee,	)	No. 86-6624
vs.	)	D.C. No.
	)	CV-83-7623
GABRIEL A. MAALOUF; BIG H CORPORATION,	)	
	)	
Defendants-Appellants,	)	ORDER
	)	
and	)	
	)	
G.A.M. ENTERPRISES, INC. D/B/A FAIRWAY RENT-A-CAR SYSTEMS,	)	
	)	
Defendant-Counterclaimant-Appellant.	)	
	)	

FILED
DEC 22 1988
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

Before: NELSON, REINHARDT and O'SCANNLAIN, Circuit Judges

Upon due consideration, the Petition for Rehearing filed October 17, 1988 is DENIED.

APPENDIX "A"

INTERNAL USE ONLY: Proceedings include all events. 86-6624 Kazan v G.A.M. Enterprises. et al. CIVATT

SAMIR [KAZAN Plaintiff - Appellee	Gloria M. Sanchez [COR LD NTC] Law Offices of Dorame & Sanchez 404 W. Fourth Street Suite B Santa Ana. CA 92701 (714) 836-1091
v.	
GABRIEL A. MAALOUF Defendant - Appellant	Jeffrey N. Samuels. Esq. 702 388 7372 [COR LD NTC ret] 1409 South Eastern Ave. Las Vegas. NV 89104
BIG H CORPORATION Defendant - Appellant	Jeffrey N. Samuels Esq. (See above) [Cor LD NTC ret] Jeffrey N. Samuels. Esq. (See above) [COR LD NTC ret]
HARRY TRUSTEE OF G.A.M. ENTERPRISES. INC., NO. BK-S-LV 82-0038 "IN NAME ONLY". Trustee	Harry McCool [COR NTC] c/o William L. McGimsey. Esq. 621 E. Charleston Blvd. Las Vegas. NV 08910
TOM GRIMMETT. TRUSTEE Trustee	Tom Grimmett [COR NTC] EDWARDS. HUNT & HALE 415 South Sixth St. Suite 300 Las Vegas. NV 89101-6937
G.A.M. ENTERPRISES. INC., AKA FAIRWAY RENT A CAR SYSTEMS Defendant-Counter-Claimant - Appellant	Jeffrey N. Samuels. Esq. (See above) [COR LD NTC ret]

Docket as of August 19. 1988 12:20 AM

NOT FOR PUBLICATION

FILED
SEP 30 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMIR KAZAN, Plaintiff-Appellee, vs.	)	No. 86-6624 D.C. No. CV-83-7623-LTL
GABRIEL A. MAALOUF; BIG H CORPORATION, Defendants-Appellants, and G.A.M. ENTERPRISES, INC. D/B/A FAIRWAY RENT-A-CAR SYSTEMS, Defendant-Counterclaimant-Appellant.	)	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding

Argued and Submitted July 13, 1988
Pasadena, California
Filed Sep. 30, 1986

Before: NELSON, REINHARDT and O'SCANNLAIN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Gabriel A. Maalouf and Big H Corporation ("BIG H") allege that plaintiff did not effect proper service of process pursuant to Fed. R. Civ. P. 4. They further allege that the default judgment entered against Maalouf and Big H and the refusal to set aside default constitute an abuse of discretion. G.A.M. Enterprises, Inc. ("G.A.M.") alleges that the dismissal of its counterclaim was also an abuse of discretion.

The court below determined that Kazan had properly served Maalouf and Big H pursuant to California law, and that Maalouf and Big H had not filed a timely answer to the complaint. The court therefore entered default against Maalouf and Big H. The court refused to set aside the default because Maalouf and Big H had been properly served and had notice of the pending complaint. The court dismissed the counterclaim after imposing sanctions on both G.A.M. and Kazan for failure to prosecute. We affirm.

DISCUSSION

I. Standard of Review

Because the district court interpreted California service of process laws, its finding that proper service of process was effected upon a defendant is subject to de novo review. In Re McLinn, 739-F.2d 1395, 1399-1400 (9th Cir. 1984) (en banc). The court's refusal to set aside a default judgment is reviewed for abuse of discretion. Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985). The dismissal of a counterclaim for failure to prosecute is reviewed for abuse of discretion. Mir v. Fosberg, 706 F.2d 916, 918 (9th Cir. 1983).

II. Maalouf's claim that service of process was defective

Maalouf and Big H err in believing that process was not properly served. Rule 4(c)(2)(C)(i) states, "a summons and complaint may be served upon a defendant . . . pursuant to the laws of the State in which the district court is held for the service of summons or other like process upon such a defendant in an action brought in the courts of general juris-

diction of that state." Although Rule 4(e) specifically provides means for service upon parties who are not inhabitants of the state, neither the advisory committee Notes nor the language of the rule itself indicates that Rule 4(c)(2)(C)(i) is limited to defendants residing within the territory of the forum state. See 4A C. Wright & A. Miller, Federal Practice and Procedure § 1114 (1987). Rule 4 is a flexible rule that should be construed liberally as long as a party receives sufficient notice of the complaint. United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984). Therefore, Maalouf and Big H's argument that California rules are irrelevant in deciding whether service was proper and that Fed. R. Civ. P. 4 requires personal service upon a defendant who resides outside the territory of the jurisdiction of the court is without merit.

Cal. Civ. Proc. Code § 415.20 allows service of process at a defendant's place of business by leaving a copy of the summons and complaint with anyone apparently in charge of the office and by thereafter mailing a copy of the complaint to the defendant. Additionally, § 415.40 provides:

> A summons may be served on a person outside the state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

The court below found that several attempts had been made to serve Maalouf and Big H and that service was valid. Counsel for Maalouf and Big H conceded at oral argument that service was valid pursuant to California procedure. Maalouf and Big H's contention that service was defective therefore fails.

III. Default Judgment

Maalouf and Big H claim that the district court abused its discretion in entering default judgment against them and in refusing to set aside the default judgment pursuant to Fed. R. Civ. P. 60(b). "A failure to make a timely answer to a properly

served complaint will justify the entry of a default judgment." Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986), amended 807 F.2d 1514, cert. denied, 108 S. Ct. 198 (1987). A default judgment will be set aside only for good cause. See generally Wilson v. Moore & Assoc., Inc., 564 F.2d 366 (9th Cir. 1977). Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment. Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974).

Maalouf and Big H filed an untimely answer setting forth general doctrines of law as meritorious defenses. However, Maalouf and Big H did not provide facts to support the defenses to the complaint. Therefore, the district court did not abuse its discretion in entering default and refusing to set it aside.

Maalouf and Big H also claim that Kazan failed to comply with Fed. R. Civ. P. 55(b)(2), which requires three days notice to a party against whom default shall be entered. Maalouf and Big H failed to raise the issue below; thus, they are barred from raising the defense on appeal. Issues not presented to the trial court will not be considered on appeal, except in exceptional circumstances. The court has discretion to consider issues not raised below if a question of law is raised, and consideraton is necessary to prevent manifest injustice. Komatsu Ltd. v. States S.S. Co., 674 F.2d 806, 812 (9th Cir. 1982).

Even if the court were to consider Maalouf and Big H's claim, they would not be entitled to relief. Rule 55 does not apply to Maalouf and Big H because they had neither appeared in the action when the default judgment was requested nor demonstrated a purpose to defend the suit. See Wilson v. Moore & Associates, Inc., 564 F.2d 366 (9th Cir. 1977) (appearance does not have to be formal where defendant has demonstrated a purpose to defend) (emphasis added). Moreover, Maalouf and Big H had notice of the action and of the requirement to answer the complaint due to the proper service of process.

IV. Dismissal of G.A.M.'s Counterclaim

G.A.M. argues that the district court erred in dismissing its counterclaim against Kazan. A dismissal for lack of prosecution must be supported by evidence of unreasonable delay. Nealey v. Transportacion Maritime Mexicana, S.A., 662 F.2d 1275, 1280 (9th Cir. 1981). Unreasonable delay causes injury to defendant in a suit. Ash v. Cvetkov, 739 F.2d 493, 496 (9th Cir. 1984) cert. denied, 470 U.S. 1007, 105 S.Ct. 1368 (1985).

G.A.M. filed a counterclaim on January 14, 1985. G.A.M.'s only attempt to prosecute consisted of a request for default judgment against Kazan five months later. The court twice issued orders to show cause why the counterclaim should not be dismissed for failure to prosecute. G.A.M. failed to appear at one of the hearings and failed to submit a response to the court's order. The court sanctioned both parties to induce action. Yet the parties continued to use dilatory tactics. The district court then dismissed the counterclaim for failure to prosecute nearly two years after it had been filed. On review this court is to give deference to the district court's decision to dismiss for failure to prosecute. Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). Under these circumstances, we find no abuse of discretion.

V. Sanctions

Both parties request sanctions on appeal. We find these requests to be without merit. The motions are denied. We must emphasize, however, that we expect strict compliance with Fed. R. App. P. 10(b)(2) which requires that if appellant intends to urge on appeal that the lower court's finding is unsupported by or contrary to the evidence then counsel must include all relevant documentation in its record of transcript.

AFFIRMED.

A TRUE COPY
ATTEST DEC
Cathy A. Catte
Clerk of Court
by: L Caldwell
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

No. CV 83-7623-LTL Date April 9, 1984
Samir Kazan vs GAM ENTERPRISES, ET AL.,

DOCKET ENTRY

PRESENT:
MANUEL L. REAL for
HON. LAWRENCE T. LYDICK, JUDGE

Lovette Fisher	Freda Mendelsohn
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS	ATTORNEYS PRESENT FOR DEFENDANTS
Alvin Harris	Gabriel Maalouf

PROCEEDINGS:
HEARING:

ORDER TO SHOW CAUSE why complaint should not be dismissed for lack of prosecution.
Defendant Maalouf's motion to stay and to strike.

Hearing held and Court denies the Defendant Maalouf's motion to stay and to strike.
Court further orders that the action is to remain open and on the calendar of Judge Lydick.

MINUTES FORM III
VII. - GEN.

Initials of Deputy Clerk

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE MANUEL L. REAL,
CHIEF JUDGE PRESIDING

- - -

SAMIR KAZAN,	)	
Plaintiff,	)	
	)	CV-83-7623-R
vs.	)	
	)	
GABRIEL A. MAALOUF	)	
ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
APRIL 9, 1984

FLORENCE GARCIA
442D U.S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

APPEARANCES

FOR THE PLAINTIFF
ALVIN HARRIS

FOR THE DEFENDANT
GABRIEL MAALOUF
PRO PER

LOS ANGELES, CALIFORNIA;
APRIL 9, 1984; 10:00 AM

THE CLERK: Item No. 4, CV 83-7623-LTL, Samir Kazan versus GAM Enterprises, et al.
Counsel, make your appearances.

MR. HARRIS: Alvin Harris appearing for plaintiff.

MR. MAALOUF: Gabriel Maalouf, your Honor, appearing in person in behalf of myself and Big H.

THE COURT: You cannot appear for the Big H.

MR. MAALOUF: I am appearing on behalf of myself, your Honor.

THE COURT: All right.

Anything further to add to the documents which have already been filed:

MR. HARRIS: Your Honor, the only thing is that Mr. Kalish never received any notice of the bankruptcy action until in the last month or so. The case originally started back in 1981 and has been delayed because of Mr. Kalish's residence in Beirut, Lebanon and his difficulty in coming here.

That is the only thing I wanted to add, that we never got any notice until this motion was filed.

THE COURT: All right. Mr. Kazan, anything you want to add?

MR. MAALOUF: I am --

THE COURT: I am sorry, Mr. Maalouf.

MR. MAALOUF: I am in support of the Judge Lydick's motion to dismiss this case, your Honor. This is the first time he is dismissing it. And the action is filed against me personally and other corporations which one of them is under Chapter 11 proceeding. And I concur with Judge Lydick's motion to dismiss the case for the third time in a row.

THE COURT: All right.

The matter will not be dismissed. The matter to stay is denied.

You prepare the order, counsel.

MR. HARRIS: Yes, your Honor.

MR. MAALOUF: I did not understand, your Honor. The matter what now?

THE COURT: The motion to stay is denied.

MR. MAALOUF: That is against GAM, your Honor?

THE COURT: As against both.

(Other court matters.)

I [illegible] certify that the foregoing is a [illegible] from the record [illegible] of the above entitled matter.

FILED
JUN 1 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAMIR KAZAN, Plaintiff, vs.	No. CV 83-7623 LTL (Px)
G.A.M. ENTERPRISES, INC., a corporation, d/b/a/ FAIRWAY RENT-A CAR & LEASING SYSTEM, GABRIEL MAALOUF, and BIG H CORPORATION, Defendants	O R D E R

This matter is here on a motion of certain defendants to dismiss pursuant to F.R.C.P. 41(b).

The motion is denied.

We note that under Local Rule 2.9.1 of this Court, a corporation may not appear in any action or proceeding pro se.

We further note that plaintiff's continued failure to diligently prosecute this action may establish bad faith and may result in sanctions including dismissal of this action.

The Clerk of the Court will serve copies of this Order by United States Mail upon counsel of record.

DATED: This _____/_____ of June, 1984.

Lawrence T. Lydick
United States District Judge

FILED
AUG 21 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAMIR KAZAN, Plaintiff, vs.	No. CV 83-7623 LTL (Px)
G.A.M. ENTERPRISES, INC., a corporation, d/b/a/ FAIRWAY RENT-A CAR & LEASING SYSTEM, GABRIEL MAALOUF, and BIG H CORPORATION, Defendants	O R D E R

This matter is here on a motion of certain defendants to dismiss pursuant to Federal Rule of Civil Procedure 41(b).

The motion is denied.

We note that compliance by defendants with Local Rule 2.1 and 2.8.2 of this Court does not appear.

We further note that the memorandum of points and authorities submitted by defendants' purported counsel in support of the pending motion is an exact verbatim copy of the memorandum submitted by then pro se defendant Maalouf in support of the motion earlier denied by the Court on June 1, 1984. Not one word has been added to or deleted from the earlier memorandum; even the numerous spelling, grammar and usage errors have been left unchanged.

Federal Rule of Civil Procedure 11 provides in pertinent part that "(t)he signature of an attorney ... constitutes a certificate by him that he has read the motion ..." In addition, Federal Rule of Civil Procedure 11 permits the imposition of sanctions upon an attorney or the represented party or both for failure by the attorney to make a reasonable prefiling inquiry into the facts and law of the case. See, e.g. Goldman v. Belden, 580 F.Supp. 1373, 1381 (WDNY 1984); Zaldivar v. City of Los Angeles, –F.Supp. – , slip.op., No. CV 841238-DWW (C.D.Ca. July 10, 1984).

On the Court's own motion, IT IS ORDERED:

1. Counsel shall submit a statement of position and points and authorities on the following questions:

a) Whether the pending motion is not in violation of Federal Rule of Civil Procedure 11.

b) Whether, if the pending motion is in violation of Federal Rule of Civil Procedure 11, sanctions payable to the Treasurer of the United States in the amount of $100.00 against defendants' counsel and $100.00 against defendants should not be imposed in accordance with Federal Rule of Civil Procedure 11.

Said statement of points and authorities shall be filed not later than September 4, 1984.

2. Hearing is set on this Order to Show Cause in Courtroom 5, United States Courthouse, Los Angeles, California on September 25, 1984 at 10:00 a.m.

The Clerk of the Court will serve copies of this Order by United States mail upon counsel of record.

DATED: This 27 day of August, 1984.

Lawrence T. Lydick
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

-000-

HONORABLE ROBERT J. KELLEHER,
JUDGE PRESIDING

SAMIR KAZAN,	)	No.
	)	CV 83-7623-RJK
Plaintiffs,	)	
	)	
vs.	)	
	)	
G.A.M. ENTERPRISES, INC.	)	ORIGINAL
ET AL.,	)	
Defendants	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLACE: LOS ANGELES, CALIFORNIA
DATE: MONDAY, OCTOBER 23, 1984

DELIA C. ROTUNNO, CSR # 2171
OFFICIAL COURT REPORTER
312 NORTH SPRING STREET, RM. 438
LOS ANGELES, CALIFORNIA 90012
(213) 687-4698

A-P-P-E-A-R-A-N-C-E-S

ON BEHALF OF THE PLAINTIFF:
ALVIN HARRIS
ATTORNEY AT LAW
820 SOUTH BROOKHURST
ANAHEIM, CALIFORNIA 92804

ON BEHALF OF THE DEFENDANT

MUSHKIN, SAMUELS & ASSOCIATED
BY: JEFFREY N. SAMUELS
ATTORNEYS AT LAW
101 CONVENTION CENTER DRIVE, SUITE 1124
LAS VEGAS, NEVADA 89109

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 11, 1985
-000-

THE CLERK: CV 83-7623-RJK.
Samir Kazan vs. GAM Enterprises, Inc., et al.
Counsel, please state your appearances.

MR. HARRIS: Alvin L. Harris representing the plaintiffs.

THE COURT: Mr. Harris.

MR. SAMUELS: Steven Samuels representing the defendant GAM Enterprises and Mr. Maalouf.

THE COURT: Mr. Samuels. Mr. Maalouf is present, is he?

MR. SAMUELS: Yes.

THE COURT: There is before the Court an Order to Show Cause why sanctions should not be imposed against the defendant's counsel.

Is there anything to be added in opposition to that order to show cause on behalf either Mr. Maalouf or, Mr. Samuels, beyond what is now before the Court?

MR. SAMUELS: Your Honor, I would submit that on the affidavit that I submitted and emphasized that we were basing our motion that we did do, the motion to dismiss, upon Judge Lydick's order denying the previous motion to dismiss before it was indicated that the primary difficulty was the non representation by an attorney of the corporate defendant.

THE COURT: That had reference solely to the corporate defendant, did it not?

MR. SAMUELS: Yes, your Honor.

THE COURT: And not to Mr. Maalouf.

MR. SAMUELS: But there is no indication in the order itself of any other reason for denial of the motion.

THE COURT: I don't know what the significance might be of that statement. The motion was denied. Perhaps the gravamen of the offense that was committed here, and it was an offense, is that that motion was made in complete violation of local rules of ths Court.

Didn't you at any time read the local rules of this Court, Mr. Samuels?

MR. SAMUELS: I did not have a copy of the local rules before I filed that motion. No, your Honor.

THE COURT: If you did have you would have recognized the fact that you had no standing as an attorney before this Court to file any piece of paper, not being a member of the Bar of this Court.

If you would have read it, the rule prohibits appearances except by members of the Bar of this Court and refers that you not only be personally present here in court, but it embrasses also the filing of a document here as an attorney. That was the violation.

Further, it is a violation of the local rules in that the motion, at the very best, was not subject to other infirmities was a motion to reconsider and there are requirements laid down for motions to reconsider, no one of which was met in the renewed motion.

The Court could make a very considerably longer recital of what is here involved. It is an affront to the Court that there should have been done the things that were done in violation of the rules and, indeed, they are sufficient to warrant the imposition of sanctions.

Not only is there a violation of the rules in what was here done, but the motion is palpably frivolous and that in itself is sufficient ground to impose sanctions.

There was issued here an order to show cause why sanctions payable to the Treasurer of the United States in the amount of $100 not be imposed.

I am going to take that as an indication that upon the amount that can be imposed as a sanction while, at the same time, suggesting that perhaps it most appropriately be in a larger amount in number of dollars.

There is a total insufficiency of grounds asserted by either defendant Maalouf or GAM to set aside the entry of the default and that motion is denied.

Is there anything further that you wish to be heard on, Mr. Samuels, before the Court makes its order with respect to the imposition of sanctions?

MR. SAMUELS: Only that I have since become a member of this Court.

THE COURT: Yes, I understand. Have you ever read the Federal Rules of Civil Procedure?

MR. SAMUELS: Yes, I am.

THE COURT: You are familiar with Rule 11, are you?

MR. SAMUELS: Yes.

THE COURT: Were you familiar with it at the time you made your appearance here?

MR. SAMUELS: Yes.

THE COURT: Can you really suggest that your signature as the attorney was well placed there as a certification that you had made reasonable inquiries into the matter and that it was well grounded?

MR. SAMUELS: Your Honor, I discussed the matter at length with my client and I also discussed the matter with the person that had prepared the original motion and I felt that the motion did have some basis.

There are conditions to the denials and the affirmative defenses raised in the proposed answer. There are counterclaims that we would have if we had leave of Court to submit them.

There is a lot to this case besides from this, you know, there are a lot of complicated issues in this case, as was indicated by Judge Lydick earlier in his original order denying the motion.

He indicated that the motion or that the matter would be dismissed if it were not prosected more diligently. And I read that as an indication that the Court was inclined to dismiss the matter except for the fact that the corporation was not represented by counsel and that is the reason that the motion was filed the way that it was.

THE COURT: Who was the person with whom you discussed the motion as originally filed?

MR. SAMUELS: Aside from Mr. Maalouf?

THE COURT: You said that he talked to the person who prepared the motion. You were there referring to one other than Mr. Maalouf, were you?

MR. SAMUELS: Yes, sir. He is a person that was in the state of Nevada who is a legal researcher and does some work. He is a law school graduate and had recently taken the California Bar.

THE COURT: When you adopted his handiwork, did it not appear to you that it was next to illiterate in the sense that the punction errors and misspellings made it, if not illiterate, at least below any acceptable standard for the preparation of a document filed in Court?

MR. SAMUELS: Well, I notice some grammatical errors and I thought that they had been corrected in the final draft and, apparently, they weren't.

I apologize to the Court for that, but I felt that the substance of the motion there was substantial to the motion. I apologize for the gram... tical errors.

THE COURT: The implication is very strong. I don't say this to reject your integrity or honesty to say to the Court but, nevertheless, the implication is very strong that there was no review, no meaningfull review of those papers, that they were merely handed to someone to copy with all their errors and that, indeed, they were not measured against the rules of the civil procedure or the local rules of this Court, and the word ought to go forward that what was done here will not be tolerated.

Had it been my case when the appearances took place, I suspect that a sterner action would have been taken than is about to be taken now and, accordingly, it is ordered that the motion of those defendants who seek to set aside the entry of default is denied on the ground that there is no adequate showing to support the motion.

Pursuant to the order to show cause re sanctions, it is ordered that there be paid forthwith by Jeffrey M. Samuels, as attorney for the defendant Maalouf, a sanction in the amount of $100 payable to the Treasury of the United States and, upon the further finding of the Court there was active

participation by Mr. Maalouf in what was done and, as you say, in your consultations with him.

Concerning the filing of the motion, it is ordered pursuant to the order to show cause that the sanctions in the amount of $100 be paid to the Treasury of the United States by Mr. Maalouf.

It might have been that sanctions would have been awarded to counsel for the plaintiff if there had been a sufficient showing to support the imposition of that sanction and that not having been done, that motion is denied.

What is the posture of the matter as you see it now, Mr. Harris?

MR. HARRIS: Well, your Honor if the motion to set aside default is denied, we have a default judgment, and we are ready to proceed.

THE COURT: You are ready to proceed to prove up your default judgment, are you?

MR. HARRIS: We are only going for a default judgment for the eighth claim for relief which is the note and I anticipated that that would be a Clerk's order.

THE COURT: That can be done before the Court upon an adequate showing by affidavit. Very well. The Court is in recess.

(PROCEEDINGS CONCLUDED.)

I, Delia C. Rotunno, certify that the foregoing is a correct transcript from the Record of Proceedings in the above-entitled matter.)

_____ DATE: _____

ENTERED
OCT 24 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
OCT 24 1984
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SAMIR KAZAN, Plaintiff, vs. G.A.M. ENTERPRISES, INC., a Corporation, d/b/a/ FAIRWAY RENT-A CAR & LEASING SYSTEM, GABRIEL MAALOUF, and BIG H CORPORATION, Defendants	No. CV 83-7623 LTL JUDGMENT

The defendants GABRIEL A. MAALOUF and BIG H CORPORATION having been regularly served with process

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and having failed to appear, and the defaults of the defendants having been entered, and this action being founded on a note, and sufficient evidence having been presented in support of plaintiff's Eight Claim for Relief:

It is therefore ordered, adjudged and decreed that plaintiff SAMIR KAZAN recover from defendants GABRIEL A. MAALOUF and BIG H CORPORATION the principle sum of $50,000.00 together with interest at the rate of eight per cent (8%) per annum pursuant to the note executed November 20, 1979 in the total sum of $19,599.94, for the total sum of $69,599.94 with interest on such sum at the rate of 11.36% per cent per annum from date of judgement, and that plaintiff recover from defendants the additional sum of $95.00 as his costs of suit and that plaintiff have its execution.

Dated: 24 October 1984

Aileen S. Mar